

COMMUNICATIONS ENTERPRISES, INC.

IBLA 89-540

Decided July 16, 1991

Appeal from a decision of the District Manager, California Desert District, Bureau of Land Management, requiring payment of rental for communication site right-of-way CA-3656.

Affirmed in part and vacated in part.

1. Appraisals—Communication Sites—Federal Land Policy and Management Act of 1976: Rights-of-Way—Rights-of-Way: Appraisals

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of fair market rental value for a communication site right-of-way will be affirmed on appeal if an appellant fails to show error in the appraisal methods used or fails to show by a preponderance of the evidence that the charges are in excess of the fair market rental value.

2. Appraisals—Communication Sites—Federal Land Policy and Management Act of 1976: Rights-of-Way—Rights-of-Way: Appraisals

Where the Bureau of Land Management is precluded by statutory proviso from expending funds in fiscal year 1991 to increase the fees charged for communication site right-of-way, a decision reappraising the fair market rental value of the right-of-way may be vacated in part to reflect the lack of authority to collect the reappraised rental prior to Oct. 1, 1991.

APPEARANCES: William A. Anderson, Esq., Bakersfield, California, for appellant; Burton J. Stanley, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Communications Enterprises, Inc. (CEI), has appealed from a May 16, 1989, appraisal decision by the District Manager, California Desert District, Bureau of Land Management (BLM), increasing the rental rate for communication site right-of-way CA-3656. The May 16 decision was based

on February 27, 1989, appraisal of the fair market value of the right-of-way and provided for a rental rate increase for CEI's El Paso Peak site from \$1,500 annually to \$5,200 annually, effective January 1, 1990.

The right-of-way is located on El Paso Peak in the SW<sup>1</sup>/<sub>4</sub> NW<sup>1</sup>/<sub>4</sub> NW<sup>1</sup>/<sub>4</sub>, sec. 29, T. 28 S., R. 40 E., Mount Diablo Meridian, California, and was originally granted to appellant on January 28, 1981, for a 15-year term, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1988). The right-of-way authorized the "[c]onstruction, operation, and maintenance of [a] mobile radio relay site," including erection of a 10- by 20-foot concrete block building and an antenna tower. The original decision which granted the right-of-way noted that the holder of the right-of-way, by its acceptance, agreed to be subject to the applicable regulations contained in 43 CFR 2800.

This is the second appraisal of the fair market value of this right-of-way which has been before the Board for review. At the time the right-of-way was issued in 1981, the rental was set at \$1,500 per year pursuant to the express terms of the grant. The rental amount was based on an "estimate" of the fair market value rental for use of the communication site made by a BLM appraiser in a memorandum dated August 10, 1978. BLM subsequently completed an appraisal of the fair market value rental in 1985 in accordance with the regulation at 43 CFR 2803.1-2(d) (1985). <sup>1/</sup> Based upon the 1985 appraisal, BLM issued a decision dated June 25, 1986, setting the rental at \$4,000 per year beginning January 28, 1987, the anniversary date of the right-of-way.

CEI appealed this prior BLM appraisal to this Board, contending that a fair rental value of the site at that time was \$960 per year. The Board found that CEI did not prove that the BLM fair market rental value was excessive. However, we set aside the BLM decision and remanded the case for further appraisal because we found that the record on appeal showed insufficient facts or analysis regarding the other leases considered in the appraisal to verify their comparability with the right-of-way appraised. Communications Enterprises, Inc., 105 IBLA 132, 135 (1988).

On remand BLM re-evaluated the site, conducting a new appraisal in which the appraiser considered 10 communication site leases with yearly rentals ranging from \$2,700 to \$14,400. Based on these leases, the appraiser determined that the fair market rental value for the El Paso Peak Site as of February 2, 1989, was \$5,200 per year. BLM followed with its May 16, 1989, decision adjusting the original \$1,500 annual rental to \$5,200 to be paid beginning January 1, 1990.

CEI again appealed to the Board, contending this new rental adjustment is beyond the comprehension of any reasonable person in that "[i]t is

---

<sup>1/</sup> This regulation authorized adjustment of rental fees "whenever necessary to reflect current fair market value." 43 CFR 2803.1-2(d) (1985).

ludicrous to think that a remote hill top could possibly rent for such an absurd rate. In fact it should not" (Statement of Reasons at 2).

CEI submits a declaration of its president, Thomas R. Poor, to substantiate its contention that the fair rental rate for this site should be no more than \$1,440 per year. CEI claims this lesser amount is the true rental value based on Poor's asserted knowledge of rental rates in the area. In a supporting affidavit filed with appellant's brief, Poor explains that this amount is based on a rate of \$20 per transmitter per month, a formula used for two communication sites leases in Kern County with which he is familiar involving mobile phone and pager repeaters. Appellant contends that sites used for multiple purposes including microwave relay and radio and television relay cannot be properly compared with the rights being appraised here. CEI cites several factors that BLM did not properly consider in its appraisal including *inter alia*, (1) the El Paso Peak site has a population base of 35,000 people for which two entities are competing from the same peak and CEI may not exclude other competitors from the area to assure a market for its service; (2) BLM has restricted CEI's use of the site to a mobile radio and paging repeater site; and (3) a comparison of a nearby right-of-way site granted to Kitchen Productions (Kitchen) in 1980, which BLM has valued the same as the CEI site, shows that Kitchen has been paying one-third the rental paid by CEI while there are no restrictions as to the site use, and Kitchen has larger improvements and occupies an area 14 times large than the CEI site. <sup>2/</sup>

[1] Section 504(g) of FLPMA, as amended, 43 U.S.C. § 1764(g) (1988), requires the holder of a right-of-way issued pursuant to FLPMA to pay annually in advance the "fair market value thereof as determined by the Secretary." Likewise, 43 CFR 2803.1-2 (a) requires the holder of a right-of-way to pay "fair market rental value as determined by the authorized officer applying sound business management principles and, so far as practicable and feasible, using comparable commercial practices." MCI Telecommunications Corp., 115 IBLA 117, 120 (1990).

Where BLM has appraised the fair market value of a right-of-way, we have consistently held that such appraisal will not be overturned on appeal unless there is demonstrated error in the appraisal method used or convincing evidence establishes that the appraised value is excessive. In the absence of a showing of error in the appraisal method used, a BLM appraisal may generally be rebutted only by another appraisal. Big Sky Communications, Inc., 110 IBLA 213, 214 (1989); Chalfont Communications, 108 IBLA 195, 196 (1989); Tortoise Communications, 105 IBLA 193, 194 (1988).

Appellant has not established error in BLM's use of the comparable lease method of appraisal. We have long held that such method is the

---

<sup>2/</sup> The Kitchen lease, CA-6482, has also now been reappraised pursuant to a Board decision in Tortoise Communications, infra. The fair rental was established by the same appraisal report at issue in this case as \$5,200 per year, as of Feb. 2, 1989.

preferred method for determining the fair market rental value of communication site rights-of-way when there is adequate data. Mountain States Telephone & Telegraph Co., 109 IBLA 142, 145 (1989); Harvey Singleton, 101 IBLA 248, 250 (1988); Full Circle, Inc., 35 IBLA 325, 333, 85 I.D. 207, 211 (1978); see 43 CFR 2803.1-2(c)(3)(i) (rental for non-linear rights-of-way including communication sites based on "market survey of comparable rentals"). Although appellant has argued for use of a rental rate based on the number of transmitters situated on the site, the BLM State Appraiser has responded to this contention in a supplement to the appraisal report. The appraiser refers to this type of arrangement as a "user sens[i]tive lease" and notes that while such agreements were fairly common 15 to 25 years ago, they are seldom entered into today. <sup>3/</sup> Accordingly, we find that no error has been shown in the method of appraisal utilized by BLM.

The BLM reappraisal utilized the "direct comparison approach" in which the value of the subject tract "is estimated by comparing it with recent rentals of properties which have similar utility in order to estimate \* \* \* the probable rental value of the subject" (Appraisal Report at 7). The appraisal noted that, while the California State Office appraisal file contains well in excess of one hundred leases of communication sites, ten of these leases were selected for comparison because of "their similarity to the subject in various elements. Except as noted in the narrative, all comparables serve small to medium sized cites or populations, are in rural, generally underdeveloped areas and provide a range, or bracket, of the value of the subject. None are what could be considered major communications peaks" (Appraisal Report at 10).

The selected sites were compared with the subject site in terms of certain pertinent factors: time (since lease issuance); location, site amenities (road access and availability of electricity); electronic versatility (suitability of the site for various types of uses); and character of

---

<sup>3/</sup> In fact, the BLM appraiser has specifically noted that such arrangements are not currently used for recent site leases with updated equipment, stating:

"Communication Enterprises, Inc. (CEI), proposes a 'user sensitive lease' based on a fixed dollar amount per month for each repeater installed. It is my understanding that such 'box rent' agreements, while never the standard of the industry, were fairly common some 15 to 25 years ago in the days of relatively large, single frequency, vacuum tube type equipment.

"Modern solid state equipment is much more compact and may incorporate such features as multifrequency capability, trunking, sidebanding, digital modulation and other methods of frequency sharing so that a great deal more capability is installed in much less space. As a result it is more difficult to equate a given 'box' with its earning ability (even many electronically sophisticated site operators have trouble with this) and such agreements are now rare. While there undoubtedly are still such agreements in existence, in ten years of talking with hundreds of lessees, lessors and site operators, I have never (that I can recall) personally encountered such an arrangement that had been recently concluded." (Appraisal Supplement at 2).

the land (ease of construction). 4/ The appraisal notes that the comparable leases "show a fairly wide range in rentals of about \$2,700 to \$14,400 per year. Such a range is not unusual for communication site leases, and is an expression of a far from perfect market." The appraisal further noted that the Cobb, Collins, Sugarloaf, and West Sonora sites were within the closest range of the subject site, stating "[w]hile differences exist, they generally tend to be offsetting with the result that these locations are overall most similar to the subject in value, providing a narrow indicated range of (rental) value of above \$5,000 to near \$5,700 per year for a site at El Paso" (Appraisal Report at 21). Based on these sites, the appraiser determined that the market rental value of the El Paso Peak site is \$5,200 per year.

We have reviewed appellant's submissions on appeal contesting the reappraisal of the El Paso Peak and have determined that it has not shown error in the appraisal method used by BLM or that the current appraised rental charge is excessive. We find that BLM adequately identified the various features of the selected comparable sites and carefully contrasted the chosen sites with the El Paso Peak site and considered the pertinent criteria in determining fair market rental value. In summary, after completion of the revised appraisal we now find sufficient basis in the record to support BLM's rental value of \$5,200 per year.

[2] Subsequent to submission of appellant's brief in this appeal, the Department of the Interior and Related Agencies Appropriations Act of 1991, P.L. 101-512, 104 Stat. 1915 (1990), was enacted on November 5, 1990. Section 321 of the Act provides that:

None of the funds provided in this Act may be expended by \* \* \* the Bureau of Land Management to implement a new fee schedule or increase the fees charged for communication site use of lands administered by the \* \* \* Bureau of Land Management above the levels in effect on January 1, 1989.

104 Stat. 1977.

4/ The following 10 leases were reviewed:

<u>Lease No.</u>	<u>Peak Name</u>	<u>Rental</u>	<u>Comparison to CA-3656</u>
20	Lane Mtn.	\$2,664	Overall Inferior
65	Rodman Mtn.	\$4,776	Overall Inferior
93	West Sonora	\$5,000	Overall Inferior
120	Collins Hill	\$4,992	Overall About Equal
107	Sugarloaf	\$5,184	Overall Offsetting
87	Cobb Mtn.	\$5,664	Overall Inferior
114	Hauser Peak	\$7,380	Overall Superior
92	Quiggs Mtn.	\$9,324	Overall Inferior
111	Tenhi	\$11,016	Overall Superior
108	West Napa	\$14,400	Overall Superior

See Appraisal Report at 10-20.

In view of this legislative development subsequent to completion of briefing in this case, counsel for appellant and for BLM were requested to brief the Board on the effect of this statutory provision on disposition of this appeal. Counsel for BLM responded that communication site uses authorized upon payment of an estimated rent subject to final determination of the actual rental rate are not within the scope of the statutory prohibition as the initial rental had not yet been finalized, citing BLM Instruction Memorandum No. 91-158 (Jan. 18, 1991). Counsel for BLM asserts that the current appraisal on appeal is, in reality, the initial determination of the fair market rental value because use of the right-of-way was authorized on payment of a rental estimate pending appraisal and the previous appraisal was remanded by the Board. See 43 CFR 2803.1-2(c)(3)(ii). 5/ Counsel for appellant has not responded on this issue.

This Board has upheld the assessment of the fair market rental value for use of a right-of-way after completion of an appraisal where use of the right-of-way was initially authorized prior to appraisal upon payment of a rental estimate pursuant to the regulation at 43 CFR 2803.1-2(b) (1980). Mountain States Telephone & Telegraph Co., 79 IBLA 5, 6-7 (1984). In Mountain States we noted that the right-of-way grant itself explicitly recognized that an advance rental deposit had been paid pending completion of an appraisal and that the deposit amount was not to be considered as having any bearing on the fair market value of the right-of-way. 79 IBLA at 7. Further, unlike the present case, the fair market rental value determined by the appraisal in Mountain States was assessed from the time the right-of-way issued. This situation may be contrasted with the present case where the express terms of the right-of-way grant provided for a rental of \$1,500 per year. There is no mention of an advance deposit pending appraisal of the fair market value of the right-of-way. The rental was based on the BLM appraiser's estimate in an August 10, 1978, memorandum to the Chief, Branch of L & M Operations: "[I]t is my opinion that the approximate fair rental of the subject site is \$1500 per year." 6/ The next appraisal of the fair market value of the right-of-way was completed in 1985 and resulted in the June 25, 1986, BLM decision setting the rental at \$4,000 per year beginning January 28, 1987 (not in 1984 when the right-of-way issued). See Communications Enterprises, Inc., supra at 133.

---

5/ This regulation authorizes the issuance of a right-of-way in advance of completion of an appraisal of the fair market rental value of the rights conveyed upon payment of an estimated rental and agreement that the rental shall be adjusted in accordance with the "final fair market rental value determination." A prior version of this regulation was in effect when appellant's right-of-way was issued. See 43 CFR 2803.1-2(b) (1980).

6/ The appraiser recommended in the memorandum that the right-of-way be issued by a decision providing for an estimated rent which would be subject to adjustment (presumably from the date the right-of-way was granted) upon completion of a formal appraisal. However, the record discloses this was not done. For a case where such action was taken, see Keith P. Carpenter (On Reconsideration), 113 IBLA 27 (1990).

We recognize that the initial appraisal of the fair market rental value of a right-of-way is properly distinguished from an estimated payment made to allow use of the right-of-way pending formal appraisal. However, we are unable to find that this distinction is relevant to the facts of the present case.

We have affirmed the BLM decision setting the fair market rental value at \$5,200 per year based on the appraisal. However, pursuant to the terms of the statutory proviso in the 1991 Appropriations Act quoted above, it appears that BLM is without authority to collect this fair market rental value prior to October 1, 1991. 7/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and vacated in part.

C. Randall Grant, Jr.  
Administrative Judge

I concur:

Franklin D. Amess  
Administrative Judge

---

7/ Even if it is assumed that the Board's decision on appeal affirming the fair market rental value of the right-of-way relates back to the date of the BLM decision, BLM is without authority to implement the revised rental during fiscal year 1991. Any effort to collect the additional rental prior to Oct. 1, 1991, would require an expenditure of funds in violation of the statutory proviso.

